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IN THE

Supreme Court of the United States

October Term, 1982

FRANK MARRALE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: February 9, 1983

Question Presented

Whether Congress intended to authorize cumulative penalties under 18 U.S.C. §§659 and 2113(b) for theft from a foreign shipment and theft from a bank, respectively, in the context of a single criminal transaction?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Frank Marrale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinion Below

The Opinion of the Second Circuit (Appendix A, *infra*, pp. 1a-19a) has not yet been officially reported.

Jurisdiction

The judgment of the Second Circuit was entered on December 13, 1982. This petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

United States Code, Title 18:

§2113. Bank robbery and incidental crimes

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny –
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the

United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

United States Code, Title 18:

§659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the posses-

sion of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggages, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen --

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both...

Statement of the Case

The indictment in this case was based upon the theft of a $2 million shipment of currency which was en route from the Republic National Bank in New York to Seoul, Korea. According to Steven Mui, the government's principal witness, the money was stolen from an armored car transporting it to John F. Kennedy Airport, by substituting bogus bags filled with newspaper for the real money.

Petitioner Frank Marrale was named along with Alphonse Marrale, his 19 year old son, and Vincent Gambale in a five count indictment stemming from this

theft.[1] Frank Marrale and Alphonse Marrale were charged with conspiring to steal and possess money stolen from a foreign shipment in violation of 18 U.S.C. §371 (Count One). Petitioner was charged with stealing money from a foreign shipment in violation of 18 U.S.C. §§659 and 2 (Count Two), and with larceny from a bank whose deposits were insured by the Federal Deposit Insurance Corporation ("FDIC") in violation of 18 U.S.C. §§2113(b) and 2 (Count Four).[2] Petitioner Marrale was convicted upon all counts. He was sentenced to serve consecutive prison terms totalling 25 years and to pay cumulative fines of $20,000.

On appeal, petitioner Marrale challenged the imposition of consecutive sentences on Counts Two and Four, contending that Congress did not intend to authorize cumulative penalties under §659 and §2113(b) for theft from a foreign shipment and theft from a bank, respectively, in the context of a single criminal transaction such as that which occurred here.

In 1981, petitioner Marrale and Mui were employed by Armored Express, Inc., a firm in the business of transporting shipments of money for commercial companies and banks. Petitioner Marrale worked as a driver. According to Mui, who testified for the government, their duties included making pickups of money from theaters and department stores. In addition, they sometimes worked on overtime runs taking large amounts of currency from New York banks to Kennedy Airport, for shipment to foreign banks.

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[1] Gambale's trial was severed.

[2] Alphonse Marrale was charged with aiding and abetting a theft from a foreign shipment, in violation of 18 U.S.C. §§659 and 2 (Count Three), and with aiding and abetting a larceny from a bank whose deposits were insured by FDIC, in violation of 18 U.S.C. §§2113(b) and 2 (Count Five). At the close of the government's case, Counts Three and Five against Alphonse Marrale were dismissed pursuant to Fed. R. Crim. P. 29. The jury found Alphonse Marrale guilty of conspiracy.

Mui and petitioner Marrale worked together, with Marrale as driver and Mui as messenger routinely making overtime runs to Japan Airlines and Korean Airlines from May of 1981. They personally delivered bags of money and paperwork for the shipment to the pilot of the aircraft and obtained a receipt. Eventually Mui observed that the pilots regularly failed to compare the serial numbers on the bags of currency themselves against the accompanying paperwork; instead the pilot would merely sign for the shipment. Mui testified that he and petitioner Marrale began to discuss stealing a shipment by substituting phony bags for the real bags of money. According to Mui, petitioner Marrale told him that he knew three individuals who would prepare the phony bags and seals; Mui was supposed to switch the bags and put the destination tags, prepared by the bank, on the bogus bags.

Mui further testified that petitioner Marrale told him the money would be sent out of the country after the theft to be laundered. Mui said that prior to the theft, petitioner Marrale told him that Marrale's son Alphonse "would know the business he's dealing with" with third parties, in case anything went wrong.

On November 10, 1981, petitioner Marrale and Mui were entrusted with delivery of the shipment to Korean Airlines which was the subject matter of the instant indictment. During this overtime run, they were to deliver $2 million to Korean Airlines and $7 million to Japan Airlines. Mui said that petitioner Marrale informed him that they were going to take the Korean shipment that night. According to Mui, petitioner Marrale stated that he would telephone his third partner and instruct him to bring the phony money to a location near Armored Express.

After they had completed their early evening run, they returned to Armored Express, according to Mui, and stopped beside a Lincoln Continental; petitioner Marrale removed five bags from its trunk and placed them behind the driver's seat of the armored truck. Mui

said that they then drove the truck to an entrance of Armored Express, and that he and petitioner Marrale went into the vault area to pick up the two shipments and necessary paperwork. Mui took five bags, containing the Korean Airlines shipment and placed them in front of the driver's seat.

Mui then removed the destination tags from the authentic bags of money, attached them to the bogus bags, placed the real bags behind the driver's seat and covered them. The bogus bags, now bearing legitimate destination tags, were placed at Mui's feet, in front of the truck. Two other Armored Express employees loaded the Japan Airlines shipment—which consisted of 19 bags of currency—into the rear of the truck. The four men then proceeded to Kennedy Airport in the truck, with petitioner Marrale driving.

Upon their arrival at the airport, Mui stated that he and another individual delivered the five bogus bags to the pilot of the Korean Airlines flight. The pilot signed for the shipment without checking the serial numbers on the seals of the bags against the corresponding paperwork. Mui and this individual met petitioner Marrale and the other guard at Japan Airlines. After this delivery they returned to Armored Express. According to Mui, upon their return petitioner Marrale gave him a set of keys to Marrale's Cougar automobile and told him to unload the bags of money hidden behind the driver's seat of the armored truck, and to put them in the trunk of the Cougar. According to Mui, he and petitioner Marrale were each to receive $400,000 from the theft. Another $400,000 was to be split by Marrale's three partners; the balance was to cover the expenses of laundering the stolen money.

The government introduced a number of consensual tape recordings between Mui and petitioner Marrale from December 4th to December 9th, 1981. Mui testified that petitioner Marrale delivered approximately $300,000 to him on December 6th, at a shopping mall in Brooklyn. In conversations between December 7th and

December 9th, Mui pressed petitioner Marrale for the $100,000 balance owed him. On December 9th, petitioner Marrale promised that Mui would have the money by the end of that week.

Reason for Granting the Writ

The Decision Below Raises an Important Issue of Federal Law Which Has Not Been and Should Be Resolved By This Court.

On appeal, petitioner Marrale argued that although the counts in issue were not multiplicitous, under the test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), that test was inapplicable. Petitioner contended that the Federal Bank Robbery Act, 18 U.S.C. §2113, is a comprehensive scheme that provides the exclusive remedy for conduct falling fully within its coverage, and that an independent provision such as 18 U.S.C. §659 may not be invoked to fragment what was in fact a single criminal transaction. In its opinion, the Second Circuit Court of Appeals failed to examine the exact parameters of the Bank Robbery Act. This examination was critical to a proper determination of petitioner's claim.

It is well settled that Congress' intent to provide multiple convictions and punishments for the same acts must be clear and unambiguous. *United States v. Di Geronimo*, 598 F.2d 746 (2d Cir.), *cert. denied*, 444 U.S. 886 (1979); *Bell v. United States*, 349 U.S. 81 (1955). What is more, absent the requisite clear legislative directive doubt will be resolved against fragmenting a single transaction into multiple offenses. *Ladner v. United States*, 358 U.S. 169 (1958).

Where two statutory provisions require different elements of proof, it is essential to determine whether Congress intended the provisions to subject a defendant to multiple punishments when applied to a single act or transaction. There can be no dispute in the case at bar that the same conduct constituted the basis for both

offenses. Under the unique facts of the instant case, the theft from the bank and the theft from the interstate shipment were literally coterminous in time and place. It was merely the fact that the stolen currency had originated from a federally insured bank on the one hand and was destined for foreign commerce on the other that distinguished the two offenses. The difference in these jurisdictional underpinnings—a federally insured bank under §2113 and an interstate or foreign shipment under §659—should not legitimize the fragmentation of what was undeniably a single criminal transaction.

The law is clear that the Federal Bank Robbery Act, 18 U.S.C. 2113, provides the exclusive remedy for conduct falling fully within its coverage. Numerous courts have so held. *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972); *United States v. Beck*, 511 F.2d 997 (6th Cir.), *cert. denied* 423 U.S. 836 (1975); *United States v. Leek*, 665 F.2d 383 (D.C. Cir. 1981). Petitioner Marrale should have been prosecuted entirely within the bank robbery statutory scheme; by venturing outside §2113, the government was able impermissibly to pyramid a maximum sentence of ten years imprisonment into a twenty year penalty.

Prince v. United States, 352 U.S. 322 (1957), one of the seminal cases on illegal pyramiding, provides a detailed analysis of the Federal Bank Robbery Act. In *Prince*, this Court held that a bank robber cannot be convicted of both robbery and entry of a bank with intent to commit a robbery if the robbery is consummated. This Court concluded that Congress made entry itself illegal in order to reach culprits who fell short of their purpose rather than to fragment the crime for the sake of enhanced punishment.

Predictably, in *Prince*, the government invoked *Blockburger* and its progeny. This Court rejected this view. Indeed, this Court stated:

> None of these [cases] is particularly helpful to us because we are dealing with a unique statute

> of limited purpose and an inconclusive legislative history. 352 U.S. at 325.

Finding the legislative history of §2113 to be ambiguous, this Court thereupon applied the traditional rule of lenity and precluded the imposition of cumulative punishments.

The result in *Prince* stemmed primarily from the Court's recognition of the comprehensive nature of the scheme embodied in §2113. The statute carefully subdivides the offense of bank robbery into a continuum of discrete steps ranging from attempted entry and entry with intent to rob; to robbery and attempted robbery by force, violence, or intimidation; to robbery utilizing a dangerous weapon; to robbery resulting in death or kidnapping. The statute correspondingly provides for penalties in increasing degrees of severity in relation to the degree of aggravation of the theft. Unable to ascertain the clear and unambiguous legislative intent which would have validated multiple punishments from the literal language of the statute itself or its sparse legislative history, this Court reversed the convictions.

Although in *Prince* both offenses fell within the scope of §2113, other courts have not deemed this factor to be determinative. For example, in *United States v. Canty, supra,* the defendant was convicted of bank robbery by force and violence under §2113(d) and of assault with a dangerous weapon under a catchall provision of the District of Columbia Code. By indicting in this manner, the prosecution was able to obtain a sentence longer than the maximum sentence authorized under the highest tier of the Federal Bank Robbery Act. Endorsing the doctrine of *Prince,* that §2113 was to be all-comprehensive in the bank robbery context, the *Canty* court vacated the defendant's conviction for assault in violation of the local criminal code.

More than a decade later, the District of Columbia Court of Appeals addressed a virtually identical question in *United States v. Leek, supra,* and emphatically

reaffirmed the *Canty* holding. This decision is especially significant because after a detailed consideration of intervening developments in this Court, the court decided that the *Canty* rationale had fully retained its vitality.

United States v. Beck, supra, reprsents another variation upon the same theme. In that case, the court considered the exclusivity of the Federal Bank Robbery Act in reference to another federal statute, the Hobbs Act, 18 U.S.C. §1951. The government had charged the defendant in *Beck* with bank larceny under §2113(b) and with extortion under the Hobbs Act, thereby obtaining a sentence longer than the maximum sentence allowable under §2113 alone. The court explicitly noted that the Hobbs Act conviction could not stand because precisely the same facts which permitted judicial notice of the interstate nature of a national bank's operations provided the basis for the convictions under both statutes. This reasoning applies equally to the case at bar.

For the reasons stated, this case raises a substantial federal question regarding the scope of the Federal Bank Robbery Act that should be reviewed by this Court on certiorari.

Conclusion

A writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Dated: February 9, 1983